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Department of Defense July 9, 1997

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Rules and Policies	)	IB Docket No. 97-142
of Foreign Participation	)	
In the U.S. Telecommunications Market	)	

COMMENTS OF THE SECRETARY OF DEFENSE

The Secretary of Defense, for the Department of Defense and as Executive Agent of the National Communications System[1],

[1]Executive Order 12472, "Assignment of National Security and Emergency Preparedness Telecommunications Functions", April 3, 1984, (49 Fed. Reg. 13471, 1984), established the National Communications System (NCS), which consists of an administrative structure involving the Executive Agent, Committee of Principals, Manager, and the telecommunications assets of the Federal organizations which are represented on the Committee of Principals. Section 1(e) of Executive Order 12472 designates the Secretary of Defense as Executive Agent of the NCS. By direction of the Executive Office of the President, the NCS member organizations (which are represented on the Committee of Principals) are: Department of Agriculture, Central Intelligence Agency, Department of Commerce, Department of Defense, Department of Energy, Federal Emergency Management Agency, General Services Administration, Department of Justice, National Aeronautics and Space Administration, the Joint Staff, Department of State, Department of Transportation, Department of Treasury, U.S. Information Agency, the Department of Veterans Affairs, Department of Health and Human Services, Department of the Interior, National Security Agency, the National Telecommunications and Information Administration and the Nuclear Regulatory Commission. The Federal Communications Commission,

through duly authorized counsel, pursuant to Section 201 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. Section 481, and the Memorandum of Understanding between the Department of Defense and the General Services Administration dated November 27, 1950, hereby files these comments in response to the above captioned notice.

In its June 4, 1997 Notice of Proposed Rulemaking in this docket (hereinafter, NPRM), the Commission has proposed to liberalize its rules on foreign participation in the U.S. telecommunications market. This proposal is in response to U.S. commitments to allow complete market access for all basic telecommunications services and to allow up to 100 percent indirect foreign ownership of common carrier radio licenses. These commitments were made in an agreement reached in the World Trade Organization on Basic Telecommunications, signed on February 15, 1997 by the United States and 68 other countries.

The Commission has tentatively concluded that it will no longer undertake an effective competitive opportunities (ECO)

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the United States Postal Service and the Federal Reserve Board also participate in the activities of the NCS. The vast majority of the telecommunications assets of these 23 organizations are leased from commercial communications carriers and serve the National Security and Emergency Preparedness (NS/EP) needs of the Federal government as well as State and local governments.

analysis for Section 214 (47 U.S.C. 214) applications from WTO members. Further, the ECO test would no longer be applied to the public interest analysis required under 47 U.S.C. 310(b)(4) for common carrier radio licenses. The Commission would allow 100 percent foreign investment in companies holding such licenses as long as the foreign investment is indirect and from an investor in a WTO member country. Finally, the Commission would no longer apply the ECO test to the analysis of cable landing license applications under 37 U.S.C. 34, lowering barriers to foreign investment in undersea cables. Applications from WTO member countries would be handled through streamlined processing. The Commission proposes to abandon the ECO test in favor of a presumption that entry by carriers from WTO countries will serve the public interest.

The Commission set out the ECO test in the Foreign Carrier Entry Order[2] adopted on November 28, 1995. The ECO test essentially looked at whether effective competitive opportunities existed for U.S. carriers in the markets of foreign carriers seeking to enter U.S. markets.

In the Foreign Carrier Entry Order, the Commission also set

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[2]In the Matter of Market Entry and Regulation of Foreign Affiliated Entities (Foreign Carrier Entry Order), FCC 95-475, IB Docket 95-22, 111 FCC Rcd. 3873 (1995)

out other factors, apart from the ECO test, which the Commission would consider in its public interest analysis under both Section 214 and Section 310 of the Communications Act. These factors included national security, law enforcement, foreign policy and trade. In its 1995 Order, the Commission acknowledged the "specific expertise" of the Executive Branch agencies in matters involving these other factors and said it would accord "deference" to the views of the Executive Branch on these matters.[3]

In this NPRM, the Commission reaffirms its commitment to continue to consider these factors when it reviews the application of a foreign-affiliated carrier and to accord deference to the views of the Executive Branch on issues uniquely within Executive Branch competence.

We strongly support the Commission's commitment to continue to consider national security concerns and the other factors cited in the NPRM as important components in the public interest review. However, we are very concerned with language in the NPRM which addresses the proposed presumption that the Commission intends to substitute for the ECO test and which seems to change the Commission's basic approach to the other public interest

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[3]Foreign Carrier Entry Order, *id*, paragraphs 38, 62-71 and 219

factors.

At paragraph 74, in a section addressing the provisions of 37 U.S.C. 310, the NPRM states "We therefore propose to eliminate the ECO test as a component of the Section 310(b)(4) public interest analysis for common carrier applicants with investment by entities from WTO countries. Instead we propose to simplify our review of such foreign investment. If an applicant's foreign investor has its home market in a WTO Member Country, ***there would be a strong presumption that denial of the application would not serve the public interest.*** We would of course, continue to consider public interest factors in determining whether to grant or deny a common carrier application under 310(b)(4), including any national security, law enforcement, foreign policy or trade concerns brought to our attention by the Executive Branch. (Emphasis added)." Further at paragraph 75, the NPRM states "We do not anticipate that we would easily be persuaded that the public interest would be served by denying a license based on Section 310(b)(4) concerns absent ***serious concerns raised by the Executive Branch."*** (Emphasis added.) Paragraph 10 of the NPRM, in addressing public interest reviews under both 47 U.S.C. 214 and 310 cites the need for **"compelling evidence"** to overcome the presumption that an application from a foreign entity from a WTO

member country is in the public interest. (Emphasis added.)

In the 1995 Order, the Commission in commenting on the ECO test variously defined it as an "element" or "part" of the public interest analysis. The Commission noted that ECO test and the other factors "collectively" constituted the public interest analysis. In addressing Section 310 issues the Commission stated that the ECO test was an "important but nondispositive" factor.[4] The language in this NPRM appears to move away from the Commission's earlier position that the ECO test was only one of several factors to be considered to a radically new position that gives primacy to the trade policy and economic issues over all the other public interest factors, absent "compelling evidence" of harm. The DOD strongly disagrees with this proposed change in the Commission's approach to the public interest analysis.

The DOD does not take a position on the Commission's proposal to adopt a "strong presumption in favor of approval" of applications from foreign carriers or investors from WTO member countries, with regard to the trade policy and other economic issues that are inherent in the public interest analysis under both 310(b)(4) and 214. However, we strongly object to any such presumption in the national security arena. National security

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[4]Foreign Carrier Entry Order, *supra,* paragraphs 19, 28, 35, and 179.

issues should be affirmatively resolved before an application from a foreign affiliated carrier is granted by the FCC. No presumption in favor of approval should be applied with respect to a public interest review for national security.

The simple fact that a foreign applicant has a home market in a WTO member country should not give rise to any presumption relating to national security. While trade and security issues at times do intertwine, they are by no means always synonymous. WTO membership may mean little or nothing in the context of national security. The existence of an open market for telecommunications services does not address how to ensure that foreign affiliated carriers comply with requirements found at 47 U.S.C. 606 (Presidential War Powers) nor does it address national security concerns laid out in other statutes such as the Communications Assistance to Law Enforcement Act (P.L. 103-314) or the Defense Production Act of 1950 (50 U.S.C. 2170, *et. seq.*).

In a recent agreement that DOD and the FBI concluded with MCI relating to its merger with British Telecommunications, DOD set out a framework for evaluation of certain national security interests that might be present in any such venture.[5] However,

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[5]*Exparte* Communication From John P. White, UnderSecretary of Defense to Chairman Hundt in GN Docket No. 96-254, Merger of MCI Communications and British Telecommunications plc, dated May 28, 1997

as with any framework, it is only a starting point for review of the national security issues associated with foreign ownership. Every application must be reviewed on its own facts. Some applications may raise a number of national security concerns while others may raise very few. However, in making this evaluation, the FCC and Executive Branch agencies who provide guidance on national security issues should not be hamstrung by a presumption that, in all likelihood, has nothing to do with national security.

Rather, the Commission should continue its existing practice of according deference to the Executive Branch on matters affecting national security. The Commission's current practice of alerting the appropriate Executive Branch agencies on foreign license applications ensures that national security and other important equities are fully considered. The Executive Branch, through the national security agencies, has the expertise to evaluate whether a foreign application could compromise important national security interests. Protecting and enhancing our war fighting capabilities is only one part of this. Among the other interests to be protected are government efforts to conduct electronic surveillance for national security purposes against foreign targets associated with the home country of a foreign owned telecommunications carrier, as well as intercept

capabilities and vulnerabilities of U.S. intelligence agencies. The FCC may not be in a position to properly evaluate the damage to national security that could result from approving a foreign license. Yet, the NPRM's strong presumption in favor of approving license applications from WTO countries threatens to turn the existing, and very workable, relationship with the Executive Branch agencies on its head by forcing national security and other executive agencies to present "compelling evidence" to the FCC that the public interest would not be served by granting the application. In some cases, presentation of "compelling evidence" could by itself compromise national security.

There is no justification for this dramatic reversal of existing practice with respect to national security and the other public interest factors. WTO membership may drive trade policy issues in a public interest determination. Such membership may provide an important discriminator in evaluating applications from the perspective of the concerns that gave rise to the ECO test. However, such membership does not play the same role in national security evaluations. Therefore, the Commission should not apply any presumption to the other vital interests that are as much a part of the public interest review as trade policy and competition issues. Furthermore, the FCC should continue to

defer to the Executive Branch agencies on matters of national security.

In addressing foreign ownership under the Cable Landing License Act, 47 U.S.C. 34, *et seq.*, the Commission requested comment on what conditions should be placed on cable landing licenses subsequent to the effective date of the WTO Basic Telecommunications Agreement. For example, should ownership restrictions be imposed on U.S. cable landing stations? (NPRM paragraph 64). Currently, the Commission requires that such stations normally be 80 to 100 percent U.S. owned.

We believe that the FCC should continue to condition cable landing licenses on U.S. ownership of cable landing stations, unless national security concerns can be addressed through some other safeguard, condition, or control. In the recent agreement with MCI/BT, DOD determined that U.S. ownership of cable landing stations was unnecessary in that particular case because MCI/BT had agreed to other terms and conditions which assured U.S. control of such facilities in the event of Presidential action under 47 U.S.C. 606. In the absence of a similar agreement or some other mechanism to ensure compliance with 47 U.S.C. 606, ownership restrictions should still be imposed.

The telecommunications industry has great strategic importance for the United States. It plays a vital role in the

protection of national security and in the national interest generally. We urge the Commission not to impose any rules which would impair the public interest as it relates to national security.

Respectfully submitted,

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